IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 09.02.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

S.A.No.263 of 1997

1.Lakshmi Ammal
2.N.Kasiviswanathan .. Appellants/Plaintiffs

vs.

T.M.Mohamad Kasim .. Respondent/Defendant

Prayer: This second appeal has been preferred against the decree and judgment dated 31.07.1996 passed by the Subordinate Judge, Nilgries, Ootacamund, in A.S.No.6 of 1995, which was filed against the decree and judgment dated 30.9.1988, in O.S.No.327 of 1986 on the file of the District Munsif, Ootacamund, Nilgiris District.

For Appellants : Mr.S.Jayaraman

For Respondent : Mr.S.K.Rakhunathan

JUDGMENT

This appeal has been preferred against the decree and judgment in A.S.No.6 of 1995 on the file of the Court of Subordinate Judge, Nilgries, Ootacamund. The appellants are the plaintiffs in O.S.No.327/1996 of the file of the Court of District Munsif, Ootacamund.

2. The short facts of the case of the plaintiff in the plaint relevant for the purpose of deciding this appeal are as follows:-

2(a) The suit is for declaration in respect of plaintiffs' right of way over the Singiri Gowder lane by way of easement and also for declaration that the plaintiffs have a right of way by way of right of easment of necessity and for consequential permanent injunction and for removal of construction put up on a portion of the said Singiri Gowder lane by way of mandatory injunction. The plaint schedule property is S.No.E 33-A/2, Rs.No.2380 in Singiri Gowder lane measuring 3.4 meters in

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

width on the western side and 1.9 meters on the Eastern side running to a distance of 13.2 meters and passing through R.S.No.2380 of Ootacamund town.

2(b) Thiru.T.Nanjundiah was the absolute owner of the suit property Door No.16, Ward No.17, Station View, Peyton's Road, Ootacamund. The Said T.Nanjundiah died in or about the year 1971 leaving behind the plaintiffs herein and other as his legal representatives. The Plaintiffs are looking after the property. The suit property was assessed to house tax by Ootacamund Municipality under Assessment No.7909 and the plaintiffs are paying the house tax for the suit property. The defendant is the owner of the adjoining property by virtue of sale deeds bearing Document No.798 and 799 of 1995 dated 6.9.1985 on the file of the Sub Registrar Ottacamund. In the said title deed of the defendant itself bearing document No.799 of 1985, it has been clearly stated that the Northern boundary of the defendant's property is Singiri Gowder lane which the lane leading from Peyton's Road also known as Railway Station Road to the plaintiffs' house through R.S.No.2380 of Ootacamund Town.

2(c) The said Singiri Gownder lane was and is the approach road which starts from Peyton's Road alias Railway Station Road leading to the Plaintiffs' property by passing along the defendant's property through R.S.No.2380 and is the Northern boundary of the defendant. The said lane is shown as a footpath and is coloured in Green in the plan filed. The said lane is 3.4 meters wide on the Western end known as Railway Station Road alias Peyton's road and 1.9 meters wide on the Eastern end and runs to a distant of 13.2 meters from the said Railway Station Road to the Plaintiffs' house. The said lane is situate between hotel Vijaya Vilas building and the plaintiffs' and defendant's property.

2(d) The said Singiri Gowder Lane has been used and is being used by the plaintiffs to reach their property for long over the statutory period for over 30 years. The plaintiffs and their predecessor in title have perfected their right over the said lane as an easmentary right by using the said lane to reach their house for long over the statutory period. The said Singiri Gowder Lane is the only approach road to reach their house and is an easement of necessity. The plaintiffs therefore are entitled to use the said lane both as an easementary right as also an easement of necessity.

WEB COPY

2(e) The defendant in the 2nd week of July, 1986, has partly blocked the said lane with a view to prevent the plaintiffs from going to their house. The defendant has put up a construction on part of the said lane leaving only a small gap between it and the adjoining property, thus causing inconvenience to the plaintiffs and blocking part of the right of way. The said construction is also an unauthorised construction not sanctioned by the rules and by-laws of the Municipality and Town planning

https://hcservices.ecourts.gov.in/hcservices/

Act and Rules. The plaintiffs are entitled for a mandatory injunction directing the defendant to demolish the construction put up which blocks the said Singiri Gowder Lane.

2(f) If the defendant succeeds in blocking the said lane the plaintiffs will be prevented from having access to their property. The defendant who is only a recent purchaser has no manner of right or title over the said Singiri Gowder Lane and the defendant's own document would show the existence of the said lane which is his northern boundary. Even as per the title deed of the defendant itself, he is only entitled to use the pathway in common with plaintiffs as was being used by his predecessors in title. The defendant is a very influential person with men, material and money at his command and if he succeeds in his attempts to block the said Singiri Gowder Lane, the plaintiffs will be put to irreparable loss and great hardship as their very approach road to go to their property will be lost. The plaintiffs are having the right of way over the suit Singiri Gowder Lane. Hence, the suit.

3. The defendant has filed written statement with the following averments:-

3(a) The plaintiffs alone are not the legal heirs of T.Nanjundiah and the plaintiffs are not entitled to file the suit. The rest of the heirs of the deceased T.Nanjundiah are necessary parties to the suit and the suit therefore is bad for non-joinder of the necessary parties. Regarding the northern boundary of the defendant's property which has been shown as Singiri Gowder Lane in one of the Sale deeds in favour of the defendant, the defendant states that the said Singiri Gowder Lane was in existence only in the sourthern most part of the land in R.S.No.2379 adjoining R.S.No.2380 and not in the northern portion of R.S.No.2380 purchased by the defendant.

3(b) As a matter of fact, when the defendant purchased his property and took possession of his property, the defendant could not see any traces of existence of any lane at his northern boundary but there is a strip of vacant land between the northern boundary of the defendant's property and the buildings in R.S.No.2379 and the width of the said open space varies from 4 feet to 2 ½ feet. The defendant's enquiries reveal that this narrow strip of land was called as Singiri Gowder Lane and whether the same was used by anyone as a footbath or not is not known to the defendant. This defendant is not concerned with the said gap as this defendant is not using the same for any purposes.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

3(c) The alleged Singiri Gowder Lane as described in the plaint schedule and as delineated in the plan attached to the plaint is not in existence on the ground at all. The description of the lane given in the plaint is incorrect. The alleged lane had never been in existence in any portion of the land in R.S.No.2380. The plaintiffs are falsely claiming the pathway over the northern portion of R.S.No.2380 with the sole objection of harassing the defendant and putting the defendant to wrongful loss.

3(d) It is utterly false to state that the alleged Singiri Gowder Lane passes along the defendant's property in R.S.No.2380. No portion of the land in R.S.No.2380 particularly the northern portion thereof constituted any lane at any point of time. The plan filed along with the plaint is only a self-serving document and no credence could be attached to the same. It is utterly false to state that the alleged lane is 3.4 meters in width on the western end and 1.9 meters in width on the eastern end and that the pathway runs to a distance of 13.2 meters. As a matter of fact, the northern wall of the defendant's building extents up to the northern boundary line of RS.No.2380 and the northern boundary wall of the old building also was touching the northern boundary line of R.S.No.2380.

3(e) Even assuming the plaintiffs had used any portion of the land as passage to have access to their house in R.S.No.2380, the plaintiffs could have used only the southern most portion of the land in R.S.No.2379 of Ootacamund Town for such access and not the northern portion of the land in R.S.No.2380 now belonging to the defendant. The defendant has been given to understand that the owners of the property in R.S.No.2379 viz. V.M.Chidambaram Iyer had filed the suit O.S.No.110 of 1984 on the file of the Sub-Court, Ootacamund against the 1st plaintiff and one of the sons of the 1st plaintiff viz. Sivaraj for a permanent injunction restraining them from trespassing into any portion of the land in R.S.No.2379 of Ootacamund Town and the said owner had also obtained an interim injunction in I.A.No.266/1984 as early as 7th April 1984. It is evident that it is only after the said order of injunction which has been passed by the Court against the plaintiffs, the plaintiffs have filed this suit with false contentions. The plaintiffs have no right over the suit lane. If really any lane had existed then the same could have existed only in the southern portion of R.S.No.2379 and the plaintiffs should have contested the suit O.S.No.110/1984 referred and established their right for the passage in the suit site. The plaintiffs having failed to do so cannot now falsely set up a right of way in the northern portion of the defendant's land. The plaintiffs are indeed estopped from putting forward any such claim for any passage or right of way. Hence, the suit is liable to be dismissed. The boundaries mentioned in the rough sketch are also not correct. The allegation that the defendant in the second week of July 1986 with a view to prevent the plaintiffs from using the land had partly blocked the same is misleading. The suit is bad for non-joinder of

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

parties. The plaintiffs have no cause of action. Hence the suit is liable to be dismissed.

4. On the above pleading the learned trial Judge has framed eight issues for trial. On the side of the plaintiffs P.W.1 and P.W.2 were examined and Ex.A.1 to Ex.A.7 were marked. On the side of the defendant, D.W.1 was examined and Ex.B.1 to Ex.B.8 were marked. After going through the evidence both oral and documentary, the learned trial Judge has dismissed the suit with costs. Aggrieved by the findings of the learned trial Judge, the plaintiffs have preferred an appeal in A.S.No.6/1995, which was also ended against the plaintiffs. Hence, the plaintiffs are before this Court by way of this second appeal.

5. The substantial questions of law involved in this second appeal are as follows:-

> i) Whether the Court below was right in law, in rejecting the evidence afforded by Ex.B.2 merely on the surmise that the description of the Singiri Gowder Lane as the Northern boundary of the property coveyed thereunder to the respondent is a mistake without there being any plea and evidence irrespect thereof?
>
> ii) Whether the Court below is right and justified in rejecting I.A.No.146 of 1996 merely for the reason that the appellants had not filed a petition for appointment of a commissioner in the trial court?
>
> iii)Whether the court below was right in law in rejecting I.A.No.168 of 1996 filed by the Appellants herein under Order 41 Rule 27 CPC for letting additional evidence in the shape of two photographs showing the existence of the lane, when the geniuses thereof was not disputed?

6.The Points:-

6(a) The suit property is a lane by name Singiri Gowder Lane shown in green coloured portion in the rough-sketch attached to the plaint. According to the plaintiffs, the said disputed land is in S.No.E 33-A/2 in R.S.No.2380. Admittedly both the plaintiffs and the defendant are having land in S.No.2380. In the plaint schedule property, the plaintiffs would say that the said Singiri Gowder lane is going along R.S.No.2380.

6(b) The learned counsel for the appellants relying on the description in Ex.B.2-sale deed infavour of the defendant would contend that the said Singiri Gowder Lane is on the north of his property purchased under Ex.B.2. The exact recital in Ex.B.2-sale deed dated 6.9.1985 in favour of the defendant-Mohamad Kasim runs as follows:-

In S.No.E 33-A/2 R.S.No.2380, out of 0.02 11/16 cents

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

0.01 6/16 cents were sold with the following boundaries:-

East - House of Subramanian
West - Railway station road
North - Singiri Gowder Lane
South - Remaining portion of the house

A perusal of the rough sketch will go to show that there is no house on the East of S.No.2380 belonging to Subramanian. The learned counsel for the appellants would fairly concede that the description of the property on the East to Ex.B.2 is incorrect, at the same time he relied on the description of the boundary for northern side for the property purchased under Ex.A.2 which is Singiri Gowder Lane. Either the plaintiff should rely on the four boundaries in entirety or to leave it in toto. He cannot approbate and reprobate. Either he must stick to the boundary description in entirety or to discard the same in toto. So the claim of the plaintiff is on the basis of the boundary recitals in Ex.B.2 to show that Singiri Gowder Lane is in existence on the north of R.S.No.2380. But to the dismay there is no mention about Singiri Gowder Lane in plaintiffs' document Ex.A.1.

6(c) Both the Courts below have disallowed the contentions of the plaintiffs only on the ground that the plaintiffs' document Ex.A.1 has no boundary description comprising the Singiri Gowder lane. No doubt, the plaintiffs have failed to take any steps before the trial Court for appointment of a Commissioner to show that there is a lane on the north of R.S.No.2380.

6(d) The learned counsel for the appellant relying on the evidence of D.W.1 in the cross-examination, would contend that the existence of Singiri Gowder Lane has been admitted by the defendant. But D.W.1 would say in the cross-examination that the extent of Singiri Gowder Lane is 10 ½ cents and he does not know the length and width of the said lane. Even the suit property scheduled to the plaint is that 3.4 meters in width on the western end and 1.9 meters on the eastern end running for the distance of 13.2 meters only. So it must be roughly around 2 cents. So the contention of the learned counsel for the appellant that the extent of the lane itself has been admitted by the defendant cannot hold any water because even according to the plaintiffs the extend of Singiri Gowder Lane is not 10 ½ cents. I am of the considered opinion that unless and until the suit lane viz. Singiri Gowder Lane is fixed on land, there cannot be an effective finding rendered in the suit. Points are answered accordingly.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

7. In the result, the appeal is allowed and the decree and judgment in A.S.No.6/1995 on the file of the Court of Subordinate Judge, Nilgries, is set aside and the matter is remanded to the trial Court (Court of District Munsif, Ootacamund). The trial Court is directed to appoint an Advocate Commissioner to localize whether Singiri Gowder Lane is situated or not with the help of a Taluk Surveyer, and dispose of the case according to law, within a period of two months from the date of receipt of copy of this order. Both parties are at liberty to let in further evidence.

ssv

Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To,

1.The Subordinate Judge, Nilgries, Ootacamund.

2.The District Munsif, Ootacamund.(with Records if any)

3.The Section Officer, V.R.Section, High Court, Madras.

+1 cc to Mr.S.K.Rakhunathan, Advocate Sr.No.7971.

+1 cc to Mr.S.P.Subramanian, Advocate Sr.No.7935.

JE(CO)
19.2.07

S.A.No.263 of 1997

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/